IN THE COURT OF APPEALS OF IOWA

No. 2-192 / 11-0096
Filed April 11, 2012

RANDY OLSEN AND LINDA OLSEN,
Plaintiffs-Appellants,

vs.

ERIC HENNINGS, Trustee of the Trust Agreement of Herthel C. Uhl dated August 23, 2001, and HERTHEL C. UHL, Individually,
Defendants-Appellees.

Appeal from the Iowa District Court for Woodbury County, Duane Hoffmeyer, Judge.

Defendants appeal the district court order issued on plaintiffs' petition to quiet title. **AFFIRMED**.

Jessica R. Noll of Deck Law, Sioux City, for appellants.

Daniel L. Hartnett and Marcy L. Iseminger of Crary, Huff, Inkster, Sheehan, Ringgenberg, Hartnett & Storm, P.C., Sioux City, for appellees.

Considered by Potterfield, P.J., Doyle, J., and Miller, S.J.*

Senior Judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

MILLER, S.J.

I. Background Facts & Proceedings

In 1976 the Iowa Department of Transportation (DOT) appropriated by condemnation certain property owned by Clarence and Herthel Uhl in order to construct Highway 520. The Uhls disputed the condemnation of a 0.02 acre triangle of land lying along the western border of the land being appropriated, land lying near the southeast corner of the Uhls' barn. In 1979, the Uhls sold a portion of their property to the west of the property appropriated by the DOT to Randy and Linda Olsen. The land purchased by the Olsens was immediately to the west of and adjacent to the disputed 0.02 acre piece of land. After the sale, the Uhls did not own any property bordering the 0.02 acre triangle.

The Uhls retained an easement, "along the existing roadway," over the property they sold to the Olsens.[1] The easement permitted the Uhls to drive over the Olsens' land in order to access farmland owned by the Uhls on the east side of Highway 520. The path travelled in using the easement went over at least a portion of the 0.02 acre triangle of land. At that time the area between the corner of the barn, now owned by the Olsens as part of the land they had purchased, and the eastern boundary of the Olsens' property was 17.1 feet wide.

In 1982, the DOT and the Uhls entered into a settlement that allowed the Uhls to retain the 0.02 acre triangular piece of land. The DOT sent a letter to the Olsens informing them of the settlement. Randy Olsen testified Clarence Uhl told him the 0.02 acre triangle was part of the Olsens' homestead and showed him

[1] In a separate opinion filed today, *Olsen v. Hennings*, No. 11-0659 (Iowa Ct. App. April 11, 2012), we addressed the separate issue of the scope of the easement.

where to put a fence. In 1982 the Olsens placed a fence along the eastern boundary of the triangle, and it remained there until 2008. After the addition of the 0.02 acres, the area between the southeast corner of the barn and the fence placed by the Olsens was 23.4 feet wide. By the inclusion of the 0.02 acres of land, the area to the southeast of the barn was able to accommodate the Uhls' use of their easement. Previously, the route had been too narrow for the Uhls to use the easement without entering onto the 0.02 acres or entering onto land owned by the DOT.

After the settlement, the Olsens treated the 0.02 triangular piece of land as their own. The Olsens mowed the 0.02 acre piece of land along with the rest of their property. They did not have any disputes with the Uhls over the ownership of the property. Clarence Uhl died in 2000, and his grandson, Eric Hennings, took over the Uhls' farming operation.

In 2003, Hennings complained that the Olsens had their fence in the wrong location; he stated that the 0.02 acre triangular piece of land belonged to the Uhls. On April 19, 2007, the DOT sent the Olsens a letter, and enclosed an affidavit explanatory of title that was to be signed by Herthel Uhl. The proposed affidavit explanatory of title stated that the Uhls claimed no right, title, or interest, including access rights, to the 0.02 acre property. Herthel Uhl refused to sign. On October 6, 2008, the DOT issued an affidavit explanatory of title which stated that the DOT, acting for the State of Iowa, claimed no right, title, or interest in the 0.02 acre property. Hennings took down the Olsens' fence bordering the 0.02

acres sometime in 2008. On December 31, 2008, Herthel Uhl signed a warranty deed transferring the 0.02 acre property to her trust.

On May 20, 2009, the Olsens filed a petition to quiet title to the 0.02 acre piece of property against Hennings, as trustee, and Herthel Uhl. They claimed they were the owners by way of adverse possession. The district court issued a ruling on November 10, 2010. The court determined the Olsens had met their burden of proof to quiet title to the 0.02 acre property. The court found Clarence Uhl intended the 0.02 acre parcel to be part of the homestead that was sold to the Olsens, and that the Olsens claimed ownership for more than ten years. In the alternative, the court determined the Olsens would be entitled to the property under a theory of boundary by acquiescence.

The Olsens filed a motion for new trial in the quiet title action. They later withdrew this motion on December 10, 2010. Hennings appealed the district court decision on January 7, 2011, asserting the court erred in its ruling that the Olsens were entitled to the 0.02 acre property by way of adverse possession.

II. Standard of Review

Actions to quiet title are tried in equity, and our review is de novo. *Garrett v. Huster*, 684 N.W.2d 250, 253 (Iowa 2004). We examine the entire record and adjudicate anew the issues properly presented. *Mitchell v. Daniels*, 509 N.W.2d 497, 499 (Iowa Ct. App. 1993). In cases in equity, we give weight to the fact findings of the district court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.904(3)(*g*).

III. Adverse Possession

In order to establish title through adverse possession a party must show hostile, actual, open, exclusive, and continuous possession, under a claim of right or color of title for at least ten years. *Garrett*, 684 N.W.2d at 253. The doctrine of adverse possession is strictly construed because the law presumes possession under regular title. *Mitchell*, 509 N.W.2d at 499. A claim of adverse possession must be established by clear and positive proof. *Louisa Cnty. Conservation Bd. v. Malone*, 778 N.W.2d 204, 207 (Iowa Ct. App. 2009).

Defendants contend the district court erred by quieting title in the Olsens to the 0.02 acre parcel of land. The defendants claim the Olsens failed to present sufficient evidence to show hostile possession, exclusive possession, or that they had held possession under a claim of right or color of title. Defendants do not dispute the elements of actual, open, and continuous possession of the contested area, or the passage of ten years.

A. Defendants claim the Olsens did not present sufficient evidence to show they had hostile possession of the 0.02 acre triangle of land. Hostile possession is possession of property adverse to the true title holder. *Garrett*, 684 N.W.2d at 253. In order to show hostile possession, a plaintiff must demonstrate conduct showing "his intention to hold title exclusive to all other titles or against the world." *Burgess v. Leverett & Assoc*., 252 Iowa 31, 36, 105 N.W.2d 703, 706 (1960). The Iowa Supreme Court has stated, "It is enough if the person . . . takes and maintains such possession and exercises such open dominion as ordinarily marks the conduct of owners in general, in holding,

managing, and caring for property of like nature and condition." *See C.H. Moore Trust Estate by Warner v. City of Storm Lake*, 423 N.W.2d 13, 15 (Iowa 1988) (citation omitted).

The Olsens enclosed the 0.02 acre triangle within their fence, showing that they included the property within their homestead. They mowed the property, and otherwise treated it as their own. We agree with the district court's statement, "The evidence shows after the 1982 appeal was resolved, Mr. Olsen fenced the disputed .02 acre triangle and treated it as his own." Through their acts, the Olsens showed they were claiming an exclusive right to the land. We conclude there is clear and positive proof the Olsens had hostile possession of the 0.02 acre property.

B. Defendants also claim the Olsens did not sufficiently show exclusive possession of the 0.02 acre triangle of land. Defendants assert the Olsens did not have exclusive possession because the easement went over the land and the Uhls continuously used the easement. "[A] claimant's possession need not be absolutely exclusive; it need only be of a type of possession which would characterize an owner's use." *Huebner v. Kuberski*, 387 N.W.2d 144, 146 (Iowa Ct. App. 1986) (quoting 2 C.J.S. *Adverse Possession* § 54 (1972) (now 2 C.J.S. *Adverse Possession* § 58, at 491 (2003)). A mere casual or occasional intrusion by others does not deprive a plaintiff of exclusive possession of property. *Id*.

An owner may permit others to use his or her property. *C.H. Moore Trust*, 423 N.W.2d at 15-16. In this case, a written easement permitted the Uhls to go

"along the existing roadway," over the property they sold to the Olsens. Thus, the Uhls' use of the property was due to the easement, and not because the Olsens did not have exclusive possession of the property. Other than the Uhls using the property under the easement, there was no evidence disputing the Olsens' exclusive possession of the 0.02 acre triangle. The district court found, "The triangle was under the exclusive possession of the Olsens except that people utilizing the easement may have traveled on a portion of it." We find there is clear and positive proof the Olsens had exclusive possession of the disputed property.

C. Finally, defendants claim the Olsens failed to show a claim of right or color of title. A party needs to establish either color of title or claim of right, but not both. *Id*. at 15. "Color of title is that which in appearance is title but in reality is no title." *Grosvenor v. Olsen*, 199 N.W.2d 50, 52 (Iowa 1972). This case does not involve color of title.

"A claim of right is evidenced by taking and maintaining property, such as an owner of that type of property would, to the exclusion of the true owner; in other words, the plaintiff's conduct must clearly indicate ownership." *Louisa Cnty. Conservation Bd*., 778 N.W.2d at 207. Acts of ownership may include occupying, maintaining, or improving the land. *Id.* A claim of right must be asserted in good faith. *Mitchell*, 509 N.W.2d at 500 (citing *Carpenter v. Ruperto*, 315 N.W.2d 782, 786 (Iowa 1982)).

On this element the district court found:

> While there is no color of title because no written documentation exists on what the parties intended for the .02 acre parcel, it is clear

> Plaintiff has met its burden of proof as to its claim of ownership by claim of right. The Olsens exercised all acts of ownership including occupying, maintaining, and improving the land and absent any proof, the court would have assumed taxes were not split out and paid by any other entity for this .02 acre.

We concur in the district court's conclusions. The Olsens engaged in acts of ownership such as those in which a property owner would have engaged. We determine there is clear and positive proof the Olsens demonstrated a claim of right to the property.

D. On appeal, defendants raise certain evidentiary issues. During the hearing, Randy Olsen testified Clarence Uhl told him the 0.02 acres were included within his homestead. Defendants claimed Clarence Uhl's statements were not admissible under the Statute of Frauds or the parole evidence rule. The Olsens responded by stating Clarence Uhl's statements were not offered for the truth of the matter asserted, but were offered to show intent. The district court reserved ruling on the objections.

In the findings of fact, conclusions of law and judgment the court notes the objections were made. The court states that Randy Olsen's testimony was objected to, "though the evidence that Mr. Olsen placed stakes and constructed a fence consistent with this conversation was not disputed." The court made no findings relying on the alleged statement by Clarence Uhl to Randy Olsen. Likewise, on our de novo review, we have not relied on this alleged statement, but have based our decision on other evidence, including the acts of persons as shown by their testimony and exhibits, the exhibits, and the physical facts shown

by the evidence. For this reason we do not further address defendants' issues on appeal concerning these evidentiary objections.

We affirm the decision of the district court quieting title in the Olsens to the 0.02 acre triangular piece of land.

AFFIRMED.